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No. 01-657

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, and
VOICESTREAM WIRELESS CORPORATION,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case presents an issue of extraordinary national importance that involves one of the largest transfers of value to private parties in U.S. history, underscores a divisive conflict among the Circuits, and implicates a wide range of federal, state, and local governmental programs.

Under the D.C. Circuit's decision, a bankrupt company has been allowed to hold hostage more than $15 billion worth of the Nation's radio spectrum even though the FCC has found that NextWave's continued hold on those public airwaves disserves the public interest, and even though NextWave has failed for more than five years to use that vitally needed spectrum to serve a single member of the public. Of equal concern is that in a time of extraordinary decline in federal revenues and huge impacts on important national budget priorities, the D.C. Circuit's decision will directly result in the loss of more than *$11 billion* to the public fisc, *see* Arctic Slope Pet. 27—which we believe may be the largest sum ever directly affected by any court decision in U.S. history.

Contrary to NextWave's attempts to belittle it, a case of this enormous importance warrants this Court's review. The D.C. Circuit's interpretation of the Bankruptcy Code as overriding the FCC's regulatory determination of the public interest not only conflicts with the law of other circuits but threatens to disrupt the ability of the FCC and numerous other government agencies to carry out important regulatory policies. And that decision, if allowed to stand, would allow future licensees to use the bankruptcy laws, as NextWave has done, to frustrate critical regulatory missions. A decision of such unparalleled consequence should not stand unreviewed.

1.a. There is a conflict among the Circuits. The Second Circuit, on the same facts, has held that the Bankruptcy Code cannot limit the FCC's regulatory authority, while the D.C. Circuit has held the opposite. NextWave attempts to explain away the conflict by arguing—as the D.C. Circuit erroneously concluded—that the Second Circuit's holding was purely jurisdictional. *See* Opp. 11-13. NextWave is mistaken. The Second Circuit did not hold that the Bankruptcy Court lacked jurisdiction to apply the Bankruptcy Code in a case properly before it. Indeed, the Second Circuit specifically addressed and rejected the merits of NextWave's argument under Section 362 of the Code. Pet. App. 125a. Rather, the Second Circuit concluded on the *merits* that the Bankruptcy Code did not apply to the FCC's regulatory acts.[1]

NextWave relies—as did the D.C. Circuit—on the Second Circuit's use of the term "jurisdiction." Opp. 11-13. But in

[1] NextWave accordingly has no basis for asserting that "the Second Circuit expressly refrained from applying the substantive provisions of the Bankruptcy Code to the license cancellation." Opp. 12. Moreover, as we have explained, in determining that the Bankruptcy Code did not limit the FCC's exercise of its regulatory authority the Second Circuit necessarily rejected NextWave's arguments based on Section 525. *See* Pet. 17 n.3.

using that term the Second Circuit was referring to the Bankruptcy Court's authority to apply the Bankruptcy Code to the FCC's regulatory acts, not its authority to *decide* Bankruptcy Code issues. *See, e.g.*, Pet. App. 124a (the "bankruptcy court founds its jurisdiction for [its action] chiefly on the automatic stay provision of 11 U.S.C. § 362"). Likewise, in noting that NextWave could seek further review in the D.C. Circuit, the Second Circuit directed NextWave to that forum if it wished to challenge the cancellation of NextWave's licenses as exceeding the FCC's regulatory authority, but the court did not hold that the D.C. Circuit was the only forum for Bankruptcy Code challenges. *See, e.g.*, Pet. App. 131a ("NextWave remains free to pursue its challenge to the FCC's *regulatory* acts" in the D.C. Circuit) (emphasis added). Any other reading would ascribe to the Second Circuit a nonsensical conclusion—that a bankruptcy court lacked jurisdiction to construe the Bankruptcy Code.

b. The decision below also conflicts with decisions of the First, Fifth, and Ninth Circuits rejecting an interpretation of Section 525 that finds a violation whenever a debtor's failure to pay a dischargeable debt is the "but for" cause of a covered action against the debtor. *See* Arctic Slope Pet. 17-20. Notably, NextWave does not deny that the application of a "but for" test would in fact conflict with those decisions. Instead, it asserts that the D.C. Circuit "did not adopt or apply a 'but for' causation test." Opp. 13. To the contrary, the D.C. Circuit held that the cancellation of NextWave's licenses violated Section 525 *regardless* of whether "the Commission had a regulatory motive for examining NextWave's timely payment record *and canceling its licenses on that basis*," because NextWave's failure to pay a dischargeable debt was "the 'sole' trigger of the license cancellation." Pet. App. 45a (emphasis added). Thus, in holding that the FCC violated Section 525 even if it had "acted for a regulatory purpose," *id.* at 51a, the D.C. Circuit clearly adopted and applied a "but for" test.

In doing so, the D.C. Circuit not only ignored the plain language of the statute and its legislative history, *see* Arctic Slope Pet. at 21-22; FCC Pet. 27-28, but deviated from those courts that have refused to apply Section 525 so expansively. Those courts have opted for "the better approach"—a "narrow" one that "requires proof that the discrimination was caused *solely* by the debtor's status [or failure to pay a debt]," *Exquisito Servs., Inc.* v. *United States (In re Exquisito Servs., Inc.)*, 823 F.2d 151, 153-154 (5th Cir. 1987) (emphasis added), and not in part by other valid concerns. Here, the FCC had a valid regulatory reason for canceling NextWave's licenses—that "NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted." Pet. App. 234a. Under the D.C. Circuit's holding, this unchallenged reason for the cancellation was irrelevant to the application of Section 525, but under the law of the Fourth, Fifth and Ninth Circuits, it would have doomed NextWave's argument.[2]

2. The national importance of this case is manifest. At a time when spectrum shortages threaten the efficient use of

[2] NextWave attempts to brush away *Laracuente* v. *Chase Manhattan Bank*, 891 F.2d 17 (1st Cir. 1989), and *Comeaux* v. *Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990), on the ground that those decisions involved Section 525(b). But sections 525(a) and 525(b) employ the same relevant language. *See* Pet. 19 n.4. Both prohibit actions against a debtor "solely because" the debtor "is or has been a debtor" or "has not paid a debt that is dischargeable in a case under this title." 11 U.S.C. § 525(a), (b). The D.C. Circuit's contrary interpretation of that identical language therefore poses a direct conflict. *See Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) ("identical words used in different parts of the same act are intended to have the same meaning") (quotation omitted); *Laracuente*, 891 F.2d at 22 n.2 (relying on cases applying Section 525(a)).

the public airwaves,[3] and federal budget deficits have returned, a bankrupt company that has provided no service has used the bankruptcy laws to hold hostage a substantial part of the public airwaves and thwart the FCC's regulatory mission, thereby depriving the public fisc of more than $11 billion. By contrast, petitioners stand ready to use that spectrum for the benefit of the public while complying fully with all regulatory requirements. The Court should not allow NextWave to continue to disserve the public interest indefinitely.[4]

NextWave incorrectly contends that the issue will not recur because the FCC is not now allowing auction winners to pay in installments. Opp. 16. Not only do hundreds of licensees continue to hold licenses under installment plans, *see* FCC Pet. 19 n.5, but the FCC continues to allocate licenses by auction. If a winning bidder were to declare bankruptcy after an auction and refuse to pay on time, under the D.C. Circuit's view the FCC would be prohibited from "deny[ing]" the bidder a license, 11 U.S.C. § 525(a), even though "full and timely payment of the winning bid" is a regulatory condition for obtaining a license. 47 C.F.R. § 24.708(a).[5]

[3] *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, FCC 02-33, App. B ¶ 35 (Feb. 6, 2002).

[4] Cellco Partnership d/b/a Verizon Wireless, former petitioner in No. 01-654, has made its own business decision to seek to be relieved of its obligations as a high bidder in the re-auction of NextWave's licenses. By contrast, petitioner VoiceStream, as well as Alaska Native Wireless LLC (in which petitioner Arctic Slope has a substantial interest), continue to seek the licenses for which they were the high bidders, and petitioners concur with the FCC that the public interest will be gravely disserved if NextWave is allowed permanently to continue its hold on the Nation's airwaves.

[5] NextWave says that the FCC could deny a license to a bidder that declared bankruptcy after an auction because in those circumstances the parties would have an "executory contract," the

NextWave claims that it is "exceedingly implausible" that a company would become the high bidder in an auction only to turn around and declare bankruptcy. Opp. 17. Yet that is exactly what NextWave and other bidders did after the auctions in this case, tying up to this day spectrum worth more than $15 billion. And it is even more likely to occur now that the FCC has discontinued the use of installment payment plans, because bidders must now make their entire payment at once. The D.C. Circuit's decision encourages bidders which find themselves unable to make that lump payment when it becomes due to buy time in bankruptcy, rather than responsibly decline licenses when they cannot pay for them.[6]

Just as important, NextWave does not deny that the D.C. Circuit's decision will affect a vast array of federal, state, and local governmental programs—including federal oil, gas, and mineral leasing and national park concessions—preventing governments from canceling or denying licenses or franchises for valid regulatory reasons whenever a debtor's failure to pay a debt is one of the reasons for the governmental action. Arctic Slope Pet. 26-27; FCC Pet. 19 n.7. Thus, the decision below will continue to impair the FCC's ability to fulfill important regulatory responsibilities under the Communications Act, and threaten the ability of numerous government agencies to exercise their regulatory authority.[7]

obligations of which are allegedly not dischargeable in bankruptcy. *See* Opp. 17-18. But even if NextWave were correct that such a debt would not be "dischargeable," a winning bidder could still prevent the FCC from enforcing its "full and timely payment" requirement by claiming that it had been "den[ied]" a license because it "is or has been a debtor." 11 U.S.C. § 525(a).

[6] Contrary to NextWave's contention (Opp. 22-24), the Court's denial of certiorari in *In re GWI PCS 1, Inc.*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001), has no bearing on the present petitions. A denial of certiorari has no precedential value at all. *See, e.g., Teague* v. *Lane*, 489 U.S. 288, 289 (1989). And in any event, *GWI* involved a different issue—the bankruptcy doctrine of equitable mootness.

3. In a final attempt to avoid review, NextWave argues that the D.C. Circuit's decision was correct. *See* Opp. 24-30. Even though the merits are not before the Court at this stage, NextWave is wrong.

a. The D.C. Circuit erred in holding that NextWave's licenses were canceled "solely because" NextWave had failed to make payments. As the Second Circuit held—and the D.C. Circuit and NextWave never disputed—NextWave's licenses were canceled because NextWave's actions demonstrated that it "was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted." Pet. App. 234a. Thus, the FCC had a valid regulatory purpose for canceling NextWave's licenses apart from its financial interest in receiving payment. As explained above, the D.C. Circuit's conclusion that the FCC's regulatory purpose was entirely irrelevant to the application of Section 525 is contrary to the plain language of the statute, its legislative history, and the decisions of other federal courts of appeals that have squarely rejected such a "but for" approach. *See also* Arctic Slope Pet. 17-22.

Contrary to NextWave's suggestion (Opp. 26), a government agency cannot defeat Section 525 by simply labeling its

[7] The Court should reject out-of-hand NextWave's reliance on the FCC's good-faith attempt to settle this case in a manner that would restore the licenses to companies which, unlike NextWave, would comply with regulatory requirements. Opp. 15. A party's decision to settle is, of course, not an admission that its position lacks merit or that it will suffer no further harm. Moreover, it is of no consequence that the settlement had no provision regarding vacatur of the D.C. Circuit's decision, because parties have no ability to dictate such actions. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 29 (1994).

actions "regulatory." For example, where a business or professional license is cancelled as a result of non-payment of a debt, such cancellation will not necessarily be supported by a valid regulatory purpose. Here, however, it is *undisputed* that the FCC had a valid regulatory purpose for its cancellation requirement—one that is central to the agency's statutory mandate to allocate the Nation's scarce spectrum in the public interest, and to ensure the "development and rapid deployment of new technologies, products, and services for the benefit of the public." 47 U.S.C. § 309(j)(3)(A). This case—in which a bankrupt company has thwarted both these goals by holding hostage $15 billion worth of vital public spectrum resources—amply demonstrates the D.C. Circuit's error. Section 525 was intended as a narrow proscription on discriminating against debtors; it was not intended to afford debtors special rights to evade valid regulatory requirements and to frustrate important regulatory missions.[8]

b. The D.C. Circuit likewise erred in holding that NextWave's debt was "dischargeable" in bankruptcy. As the Second Circuit held, NextWave's payment obligations embodied more than the FCC's financial interest in receiving payment. Those obligations were express regulatory conditions which "ensure[d] that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." Pet. App. 235a. So long as NextWave retained its licenses, its payment obligation was not a debt "dischargeable" in bankruptcy because the Bankruptcy Court was "utterly without the power" to modify valid regulatory conditions duly promulgated under the FCC's statutory

[8] NextWave contends that "courts uniformly hold" that Section 525 applies "even where the underlying payment obligation purportedly serves regulatory interests as well." Opp. 26. But no regulatory purpose was advanced in the cases cited by NextWave. And even if those cases did stand for such a proposition, that would only heighten the conflict presented here.

authority. Pet. App. 236a. To hold otherwise would allow bankruptcy courts to override important regulatory conditions simply by deeming those conditions dischargeable debts.

c. Although NextWave attempts to deny it, the discord between the Communications Act and the Bankruptcy Code that results from the D.C. Circuit's decision is obvious. *See* Opp. 29-30. In amending the Communications Act to provide for competitive bidding, Congress directed the FCC to promote important governmental objectives. By interpreting the Bankruptcy Code to require that licenses be retained by an entity the FCC has determined will not further those objectives, the D.C. Circuit undermined the express policies of the Communications Act. Had the court properly construed Section 525, this needless conflict between two statutory schemes would have been avoided. NextWave argues that the FCC remains free to "adopt and enforce regulatory conditions as it deems appropriate." *Id.* at 18. But that is just what the FCC attempted to do here, and the D.C. Circuit nevertheless held that the FCC violated Section 525.

d. NextWave also contends that the Court should deny certiorari because on remand the D.C. Circuit may have to rule on alternative arguments. Opp. 19-22.[9] But the Court routinely grants certiorari to consider important issues even though there may be the prospect of further proceedings.

[9] Contrary to NextWave's assertion (Opp. 19), the D.C. Circuit did not rule on the merits of NextWave's argument under the Bankruptcy Code's automatic stay provisions. The court considered the automatic stay provisions only in the course of rejecting one of the FCC's arguments under Section 525, Pet. App. 40a-41a, and the court was absolutely clear in limiting its holding to that single issue. *See* Pet. App. 51a ("In view of our conclusion that the Commission violated section 525 of the Bankruptcy Code in canceling NextWave's licenses, we need not consider NextWave's remaining Bankruptcy Code arguments * * *.").

See, e.g., Los Angeles Police Dep't v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 41 (1999); *NCAA* v. *Smith*, 525 U.S. 459, 469-470 (1999). Having sat on its licenses for more than five years, NextWave is in no position to argue that this Court should deny certiorari to avoid further delay.[10]

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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[10] In any event, it should not take long to dispose of those arguments. NextWave's automatic stay argument is groundless because, *inter alia*, the cancellation of NextWave's licenses was itself automatic and thus did not involve any affirmative "action" or "act" against the debtor. 11 U.S.C. § 362(a)(1), (3), (5). *See FAA* v. *Gull Air, Inc. (In re Gull Air, Inc.)*, 890 F.2d 1255 (1st Cir. 1989) (automatic withdrawal of airline landing slots did not violate automatic stay); *United States* v. *Kansas Personal Comm. Servs., Ltd.*, 256 B.R. 807 (D. Kan. 2000) (automatic cancellation of debtor's spectrum licenses did not violate automatic stay). And NextWave's due process argument fails because NextWave was clearly informed, in both the licenses and elsewhere, that non-payment would "result in the automatic cancellation" of the licenses. Pet. App. 388a; *see* FCC Ct. App. Br. 26-30.